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No. 87-1311

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL ALAN LAU AND BRUCE TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioners contend that "similar act" evidence is admissible at trial under Fed. R. Evid. 404(b) only when the district court finds that the similar acts have been proved by clear and convincing evidence.

1. Following a jury trial in the United States District Court for the District of Puerto Rico, both petitioners were convicted on one count each of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846; importation of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2; and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Lau was sentenced to concurrent terms of 29 years' imprisonment and a $40,000 fine on the conspiracy and importation counts. On the possession count, he was sentenced to a consecutive term of 15 years' imprisonment and a $20,000 fine (Pet. App. 38-39). Petitioner Taylor was sentenced to concurrent

terms of 15 years' imprisonment and a $20,000 fine on the conspiracy and the importation counts, and a consecutive term of ten years' imprisonment and a $20,000 fine on the possession count (*id.* at 41-42). The court of appeals affirmed (*id.* at 5-26).

The evidence at trial showed that on August 9, 1985, petitioner Lau landed a helicopter in San Juan, Puerto Rico, where it was met by Lau's business partner, petitioner Taylor. Lau and a passenger unloaded several suitcases from the helicopter for transfer to an airplane, which was to carry Lau's passengers and the baggage to Florida. The airplane's pilot, however, insisted on seeing the contents of the suitcases; when the pilot opened the suitcases in the presence of a customs inspector, he discovered 193 pounds of cocaine. Pet. App. 8-10.

At trial, the government informed the district court that it intended to offer evidence of petitioners' similar acts under Fed. R. Evid. 404(b). Specifically, the government wanted to introduce testimony by Thomas Aiello that, in January 1983, Aiello had assisted Taylor and others in unloading a number of boxes containing cocaine from an airplane that had been piloted by Lau. Petitioners objected, arguing, among other things, that their participation in the January 1983 drug venture could not be established by clear and convincing evidence (Tr. 430-437).

At a hearing on petitioner's objections, Aiello testified that in January 1983 he assisted a group of drug smugglers in unloading cocaine from an airplane in Broxton, Georgia. He identified Lau as "Mike," the pilot of the airplane, and Taylor as "Bruce," one of the offloaders (Tr. 445). Aiello stated that he first met Taylor at the landing strip about one week before the plane landed (Tr. 444-445), and that he first met Lau in August 1982 at an airport lounge in Atlanta, Georgia (Tr. 446). Aiello indi-

cated that he had an opportunity to observe petitioners for several hours because the plane became stuck in mud. Unable to move the plane, Aiello and petitioners drove to Jacksonville together. Tr. 449-451. In addition, Aiello testified that he was arrested by federal agents in late 1983 (Tr. 446), and that he subsequently selected photographs of each petitioner from an array (Tr. 447-448). Aiello's account was in part corroborated by the testimony of a federal agent (Tr. 469-470, 483). After hearing that evidence, the district court permitted Aiello to testify at trial (Tr. 487-488).

The court of appeals affirmed. In rejecting petitioners' challenge to the admission of the similar act evidence, the court noted that "[s]everal factors weigh in favor of a correct identification" of petitioners by Aiello: "Aiello twice confidently identified Lau and Taylor in open court, both before the judge and before the jury"; "Aiello had adequate opportunity to observe Lau and Taylor at the time of the Broxton incident" (Pet. App. 17); independent corroboration "exist[ed] in the facts that Lau has a license to fly the type of plane used at Broxton (Tr. 583), that Taylor was nearby in Alabama at the time (Tr. 602, 607), and that Aiello consistently used [petitioners'] correct first names from the time that he first described the Broxton incident to drug enforcement agents" (Pet. App. 18). The court also noted that "Aiello correctly identified [petitioners] from a photo album that a DEA agent showed him sometime before the present [cr]ime took place," so that "the DEA could not have impermissibly encouraged him to identify Lau and Taylor with an eye towards prosecuting the present crime" (*id.* at 19-20).[1]

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[1] The court also noted several considerations that pointed in the other direction: shortly after his arrest, Aiello gave physical descriptions of petitioners that misstated their heights, and he may have

With this as background, the court rejected petitioners' argument that Aiello's testimony should have been excluded because it did not establish their involvement in the Broxton incident by clear and convincing evidence. The court explained that it "has not laid down a separate mechanical evidentiary test for 'past bad act' identification" (Pet. App. 22). But "[w]ithout expressing a view about whether the evidence here is or is not 'clear and convincing,' " the court "conclude[d], on balance, that its probative value is sufficient to bring the question of admissibility within the scope of the trial court's lawful decisionmaking authority" (*id.* at 23).

2. Petitioners contend (Pet. 10-15) that evidence of "similar acts" is admissible under Fed. R. Evid. 404(b) only when the district court is satisfied by clear and convincing evidence that the defendant committed those acts. As petitioners correctly note, the circuits are in disarray on this issue: several have adopted petitioners' standard, while others have held "similar act" evidence admissible under a less exacting test. See U.S. Brief at 13-14 n.3 (citing cases) in *Huddleston* v. *United States*, No. 87-6.[2] The propriety of the clear and convincing standard currently is before the Court in *Huddleston*. Because the court below expressly declined to determine whether the evidence here satisfies that standard, this case should be held pending the Court's decision in *Huddleston* and disposed of in light of that decision.

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incorrectly stated that Lau was clean shaven (Pet. App. 18). In addition, the court concluded that there were some suggestive elements to the photo array (*id.* at 20).

[2] We are furnishing a copy of our brief in *Huddleston* to counsel for the petitioners here.

Respectfully submitted.

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Solicitor General

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